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IN THE

Supreme Court of the United States

October Term, 1942.

No. 909

CATHERINE NESA CONTERNO,

Petitioner,

vs.

NAT ROGAN, Collector of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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CATHERINE NESA CONTERNO,

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NAT ROGAN, Collector of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

The petition of Catherine Nesa Conterno respectfully shows:

I.

Summary Statement of the Matter Involved

The Commissioner of Internal Revenue levied a tax against your ptitioner in April of 1940 [R. 42] on wine that had been destroyed by fire while stored in a winery

owned and operated by petitioner. The wine in question was owned by petitioner and had not been sold or contracted for sale or encumbered in any manner. [R. 17, 18.] The tax was claimed to be due by reason of the provisions of Section 611 of the Act of February 24, 1919 (Revenue Act of 1918, as amended, and now Section 3030 (a)(1)(A), Internal Revenue Code). After an application for an abatement of the assessment had been denied [R. 19], your petitioner paid under protest the sum of $1,937.51 on September 3, 1940 [R. 19], said sum being the amount of the tax assessed, plus interest and penalties. On November 5, 1940, your petitioner filed a claim for refund which was rejected on December 4, 1940. [R. 19.] On March 27, 1941, your petitioner instituted an action for the recovery of the tax against the local Collector of Internal Revenue, respondent in this proceeding. The amended complaint, the pleading upon which the parties went to trial, stated two separate causes of action. [R. 7.] The first cause of action was based on the theory that the tax never legally attached. The second cause of action was based on the theory that the Commissioner should have abated the tax inasmuch as your petitioner was not indemnified for the loss of the tax assessed. Only the first cause of action was tried. [R. 22.] The court, sitting without a jury, gave judgment for plaintiff and your petitioner [R. 23], judgment being entered December 31, 1941. [R. 50.] On March 26, 1942, defendant, respondent herein, appealed to the Circuit Court of Appeals for the Ninth Circuit [R. 51], which court reversed the judgment of the District Court and remanded the cause to the District Court for trial upon the second cause of action. [R. 72.]

II.

Statute Involved.

Section 611 of the Act of February 24, 1919 (Revenue Act of 1918, as amended, Section 3030(a)(1)(A) of the Internal Revenue Code, as it appeared prior to the Act of June 24, 1940, Chap. 418, Sections 1 and 2, 54 Stats 516), provide as follows:

> "Upon all still wines, including vermouth, and all artificial or imitation wines or compounds sold as still wine, produced in or imported into the United States after February 24, 1919, or which on February 25, 1919, were on any winery premises or other bonded premises, or in transit thereto or at any customhouse, there shall be levied, collected and paid taxes at rates as follows, when sold, or removed for consumption or sale:
>
> (Here follow rates.)
>
> "The taxes imposed by this subparagraph (A) of this paragraph, shall not apply to de-alcoholized wines * * * nor, subject to regulations prescribed by the Commissioner, with the approval of the Secretary, to wines produced for the family use of the duly registered producer thereof and not sold or otherwise removed from the place of manufacture and not exceeding in any case two hundred gallons per year."

III.

Proceedings in the Circuit Court.

Appellant contended that the statute above quoted laid a tax upon the manufacture of wine and that payment only was delayed until sale or removal for sale and that thereafter the tax assessed by the Commissioner legally attached.

Appellee, your petitioner, contended that the statute above quoted laid a tax upon the sale of wine or its removal for sale or consumption and that, since the wine was destroyed before being sold or removed for sale or consumption, the tax did not legally attach.

The Circuit Court of Appeals reversed the District Court and found that appellant's contention was correct. The opinion of the Circuit Court of Appeals was reported in 132 Fed. (2d) Adv. 726, and is found at page 64 of the transcript of record.

IV.

Jurisdiction.

The judgment of the Circuit Court of Appeals reversing the trial court was entered December 31, 1942. [R. 72.] A petition for rehearing was seasonably filed January 29, 1943. [R. 73.] The petition for rehearing was duly entertained and denied February 16, 1943. [R. 73.] The jurisdiction of this court is invoked under Section 240 of the Judicial Code (U. S. Code, Title 28, Section 347).

V.

Question Presented.

Does the tax on wine imposed by Section 611 of the Act of February 24, 1919 (now Section 3030(a)(1)(A), Internal Revenue Code), attach when such wine is produced or when such wine is sold or removed for consumption or sale?

VI.

Reasons Relied on for the Allowance of the Writ.

(1) The Court Below Has Decided an Important Question of Federal Law Which Has Not Been but Should Be Decided by This Court.

Your petitioner has contended that the tax on wine imposed by Section 3030(a)(1)(A) by the clear wording of the statute attaches not at time of production of the wines, but upon sale or removal for sale or consumption. Respondent has contended that the tax imposed by said statute attaches upon production of wine. The decision of the court below adopts respondent's theory. Neither this court nor any other circuit court of appeals has ruled upon the question.

The question is of the utmost importance to those persons in the wine making industry, inasmuch as the decision made by the Circuit Court in the instant case places the burden of tax upon the producer for all wine produced by him even though the wine is destroyed or otherwise removed from his possession before the benefits are acquired, contrary (so we contend) to the intention of Congress as evidenced by the plain wording of the statute. Petitioner submits that the question involved in the case at bar is of sufficient importance to justify this court in issuing the writ hereafter prayed for. (*International Ry. Co. v. Davidson*, 257 U. S. 506, 516, 66 L. Ed. 341, 347.)

The action of the court below was largely determined by the decision of this court in *Liggett & Myers Co. v.*

U. S., 299 U. S. 383; 81 L. Ed. 294, as shown by the following statements in the opinion of the court below:

> "But notwithstanding appellee's earnest and in some of its phases convincing argument, we are at once confronted with the opinion and decision in Liggett & Myers Co. v. U. S., 299 U. S. 383." [R. 67.]

> "The statutes for tobacco and still wines are basically the same, using in a large part the same phraseology, and we are unable to arrive at any other conclusion than that the statutes would receive identical interpretation by the Supreme Court." [R. 68.]

It is earnestly submitted by your petitioner that the statute involved in the case at bar is distinguishable from the statute construed by this court in the *Liggett & Myers* case. Moreover, a factual distinction exists between tobacco manufacture and wine production whereby the two processes are not at all analogous. In view of the fact that the court below was mistakenly guided (so we contend) by a decision of this court which has no application to the case at bar, it is respectfully submitted that this court should review the case. See *Webster Elec. Co. v. Splitdorf Electrical Co.*, 264 U. S. 463, 469; 68 L. Ed. 792, 795.

Moreover, while it is true that the issue involved in this case has never been decided by another Circuit Court, the only reported decision that directly rules upon the matter is *Fresno Grape Prod. Corp. v. U. S.* (Court of Claims), 11 Fed. Supp. 55. This case specifically upholds the contention of your petitioner. It should be noted that the court that decided the cited case was composed of four judges, all of whom concurred in the decision. Certiorari

has been granted by this court when conflicts exist between decisions of courts other than circuit courts. See *Aetna Ins. Co. v. United Fruit Co.*, 304 U. S. 430; 82 L. Ed. 1443. The distinctions relied upon by petitioner and a complete analysis of the cases cited herein will be more fully discussed in the brief in support of this petition.

(2) The Court Below Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Court.

Petitioner contended in the Circuit Court of Appeals that the statute involved in the case at bar was clear and unambiguous and that no occasion existed to resort to administrative interpretation as an aid to construction of the statute. This court has so held in many cases.[1] Contemporaneous construction, no matter how long continued, must yield to the positive language of the statute.[2]

The Circuit Court of Appeals apparently overlooked this principle of law as enunciated by this court, since, without holding that the statute was ambiguous, it declared in its opinion that administrative regulation "indicate an interpretation consistent with the theory that the tax was a producer's tax." [R. 69.] Your petitioner respectfully submits that the statute is clear and concise in meaning and that resort to administrative interpreta-

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[1]*U. S. v. Grant*, 110 U. S. 219, 221; 28 L. Ed. 126, 127; *Fairbank v. U. S.*, 181 U. S. 283, 311; 45 L. Ed. 862, 874.

[2]*Houghton v. Payne*, 194 U. S. 88; 48 L. Ed. 888; *Helvering v. Credit Alliance Corp.*, 316 U. S. 107; 86 L. Ed. 1307.

tion in aid of construction is contrary to the decisions of this court.

Respondent contended in the Circuit Court of Appeals that by re-enactment of the statute after administrative regulation, Congress impliedly adopted such administrative regulation as the correct construction of the law. Petitioner contended that by decisions of this court this principle is subject to several exceptions. The principle does not apply where the law is clear in its meaning. *Biddle v. Commissioner of Internal Revenue,* 302 U. S. 573, 582; 82 L. Ed. 431, 439. Nor does the principle apply if the construction is plainly erroneous. (*U. S. v. Missouri Pacific R. R. Co.,* 278 U. S. 269; 73 L. Ed. 322.) Nor does the principle apply if the administrative regulation does not purport to clarify the particular matter in dispute. (*Helvering v. New York Trust Co.,* 292 U. S. 455, 468; 78 L. Ed. 1361, 1368; *Texas & P. R. Co. v. U. S.,* 289 U. S. 627, 643; 77 L. Ed. 1410, 1425.) Apparently, since the opinion made no reference to it, this contention of petitioner was also overlooked by the Circuit Court of Appeals. As will appear from the brief in support of this petition, the decision of the Circuit Court of Appeals in the instant case is directly in conflict with the above principles.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 10178, Nat Rogan,

Collector of Internal Revenue, Appellant, vs. Catherine Nesa Conterno, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States and that the judgment herein of said Circuit Court be reversed by this court, with directions to affirm the judgment of the District Court, and for such further relief as to this court may seem proper.

Dated: April 7, 1943.

CATHERINE NESA CONTERNO,

HAROLD C. MORTON,
Counsel for Petitioner.

JOHN H. BLAKE,
Of Counsel.

I, Harold C. Morton, attorney for the petitioner, do hereby certify that the foregoing petition for a writ of certiorari is presented in good faith and not for delay.

HAROLD C. MORTON.

IN THE

Supreme Court of the United States

October Term, 1942

No.....

CATHERINE NESA CONTERNO,

Petitioner,

vs.

NAT ROGAN, Collector of Internal Revenue,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Statement.

A statement disclosing jurisdiction has heretofore been made in the preceding petition under IV. A statement disclosing the proceedings in the Circuit Court of Appeals has heretofore been made in the preceding petition under VI. A statement of the case has heretofore been made in the preceding petition under I. All of the above statements are hereby adopted and made a part of this brief.

II.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that Section 611 of the Act of February 24, 1919 (Revenue Act of 1918, as amended, now Section 3030(a)(1)(A) of the Internal Revenue Code), said statute being quoted in the preceding petition under II, laid a tax upon the production of wine rather than upon the sale or removal for consumption or sale.

2. The Circuit Court of Appeals erred in resorting to administrative interpretation as an aid to construction of the above statute, inasmuch as the meaning of the statute is clear.

3. The Circuit Court of Appeals erred in relying upon *Liggett & Myers Tobacco Company v. U. S.* as binding authority in the case at bar, since both the law and the facts are distinguishable.

III.

ARGUMENT.

Summary of the Argument.

Briefly, petitioner's position is that the statute here involved is subject to only one reasonable construction. It levies a tax to attach upon the sale of wine or its removal for consumption or sale. Inasmuch as in the case at bar the wine upon which the tax was assessed was destroyed prior to its sale or removal, the wine never became subject to the tax. Petitioner relies upon three arguments. Firstly, the plain wording of the statute allows only one reasonable construction, and this construction has been

adopted by the only court that has heretofore ruled upon the question. Secondly, administrative regulation by the Internal Revenue Bureau did not change the result. Thirdly, the case so strongly relied upon by the Circuit Court of Appeals has no application to the case at bar.

POINT A.

The Statute in Question Is Subject to Only One Reasonable Construction, That the Tax Assessed Attaches at the Time of Sale or Removal for Consumption or Sale.

Petitioner has urged throughout the proceedings below that Congress, by enacting the statute involved herein, intended to impose a tax upon the sale or removal of wine and not upon its production. The language of the statute is perfectly clear. Pertinent parts of the statute in question are here quoted for the convenience of the court.

> "Upon all still wines, * * * there shall be levied, collected, and paid taxes at rates as follows, *when sold or removed for consumption or sale*:" (Emphasis supplied.)

Immediately upon reading the language of the statute one notices that the adverbial clause "when sold or removed for consumption or sale" immediately follows the phrase "shall be levied, collected, and paid taxes at rates as follows." There is no attempt to separate the verbs and thus make the adverbial clause modify only one. The phrase "taxes at rates as follows" refers to all three of the preceding verbs. Therefore, the adverbial clause immediately following must of necessity modify all three of the preceding verbs. Due to the structure of the sentence,

the clause denoting time can only apply to all three of the verbs collectively. To make the clause denoting time apply merely to the last verb is to adopt a strained and unnatural interpretation without any logical reason therefor.

Respondent has urged in the proceedings below that the adoption of petitioner's theory results in nullifying certain portions of the statute. Specifically, respondent states that the following portion of Section 3030(a)(1)(A), Internal Revenue Code, is thereby rendered meaningless:

> "The taxes imposed by this subparagraph (A) of this paragraph shall not apply * * * to wines produced for the family use of the duly registered producer thereof and not sold or otherwise removed from the place of manufacture and not exceeding in any case two hundred gallons per year."

Respondent has contended that petitioner's theory renders unnecessary the inclusion of the quoted part of the statute. Petitioner has contended that the purpose of the quoted portion is to allow a producer of wine to remove a certain portion of wine from the place of production for the sole purpose of family consumption. Without such a provision, the tax under either petitioner's or respondent's theory would attach when the wine was removed for consumption even though the amount removed was insignificant. The quoted portion is not rendered unnecessary by petitioner's contention, but rather such a provision is absolutely imperative if the producer is to be permitted to remove wine made by himself for his own consumption without the payment of tax.

Respondent also contends that Section 3039(a), Internal Revenue Code, is rendered meaningless by petitioner's interpretation. This section provides as follows:

> "The Commissioner, with the approval of the Secretary, is authorized to make such allowances for unavoidable loss of wines while on storage or during cellar treatment as in his judgment may be just and proper."

But this section does not state that the Commissioner may make allowances for *unsold* wines lost while on storage. If the wines had been sold for future delivery, or even if the wine maker had entered into a contract to sell the wine at a future time, without such a provision the tax would attach even though no benefits had accrued. The section does not direct the Commissioner to abate the tax, but rather it *permits* the Commissioner in his discretion to abate the tax in the event the tax had legally attached prior to destruction. It is by no means uncommon for a wine maker to contract for the sale of his product before cellar treatment or aging has been completed. During this period of time the wine maker is protected by reason of Section 3039(a) in the event the wine is destroyed. Such a provision is imperative to prevent the harsh effects resulting from the imposition of the tax as aforesaid. In the case at bar, the wine was destroyed while on storage but before being sold, contracted for sale or encumbered in any way. [R. 17, 18.]

The only reported case that has ruled upon the statute in question is the case of *Fresno Grape Products Corp v. U. S.* (Court of Claims, June 3, 1935), 11 Fed. Supp. 55. In this case plaintiff, a wine producer, sold a quantity

of wine. Before removal from the winery, but after the sale, the wine was changed into vinegar stock by the addition of acetic acid. Thereafter the vinegar stock was removed. Defendant levied a tax under the provisions of Section 611 of the Revenue Act of 1918 upon the wine, which plaintiff paid under protest. In respondent's brief filed in the court below, this section is conceded to be substantially the same as the statute under which the tax was levied in the case at bar. After its claim for refund had been rejected, plaintiff sued for recovery of the tax. Plaintiff's theory was that the tax was essentially a beverage tax and that, since the wine was not to be used as a beverage and at the time of removal the product had ceased to be wine, the tax was invalid. Defendant's theory was that at the time of sale the wine was a potable beverage and was therefore subject to a tax. The court held in favor of the taxpayer, saying at page 59:

> "In the instant case, the statute imposes a tax and directs its collection on wines stored in a bonded warehouse when it is sold or removed from such premises for consumption or sale. *The tax is not imposed on wine held in a bonded warehouse for sale, but it attaches and is payable only when wine so held is sold or removed for consumption or sale. The defendant admits in the brief, and the regulations, as we have seen, provide, that when wine stored in a bonded warehouse turns to vinegar from natural causes it is not taxable under section 611, upon sale or removal."* (Emphasis supplied.)

In the above quotation, attention is called to the fact that the defendant conceded that if the wine had turned to vinegar from natural causes before sale, the tax could

not have been collected. Petitioner submits that destruction by fire should be treated no differently than destruction by any other cause.

The decision may be said to be precisely in point. The theory adopted is that contended for by petitioner. The decision was rendered not by one judge, but by four judges, all of whom concurred, thus entitling the case to be considered as persuasive authority. The decision was never appealed by the Government. Petitioner's theory is upheld, therefore, not only by the language of the statute itself, but by the only case that has heretofore construed the statute.

POINT B.

Administrative Regulation With Respect to the Statute Involved Herein Does Not Prevent the Adoption of Petitioner's Theory.

Respondent contended in the court below that administrative regulation of the Bureau of Internal Revenue should be resorted to as an aid to statutory construction. Petitioner contended that this principle can only apply in the event the meaning of the statute to be construed is in doubt. This court has stated in *U. S. v. Graham*, 110 U. S. 219, 221; 28 L. Ed. 126, 127:

> "Such being the case, it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation. If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive if not absolutely controlling, in its effect.

> But with language clear and precise and with its meaning evident, there is no room for construction and, consequently, no need of anything to give it aid. The cases to this effect are numerous. Edwards v. Darby, 12 Wheat., 206; U. S. v. Temple, *supra*; Swift Co. v. U. S., 105 U. S. 695 (XXVI, 1109); Ruggles v. Ill., 108 U. S. 526 (XXVII, 812)."

And again this court stated in *Fairbank v. U. S.* 181 U. S. 283, 311; 45 L. Ed. 862, 874:

> "From this resume of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful."

Petitioner has urged under Point A of this brief that the statute involved herein is perfectly clear. The court below did not specifically hold that the meaning of the statute was left in doubt, but the court below did give effect to administrative regulation in arriving at its decision. [R. 69.] We respectfully submit that the court was in error in so doing.

Assuming, however, that the statute involved herein is of doubtful meaning and that therefore resort to administrative regulation as an aid to its construction was

justified, petitioner has been unable to find any regulation which states or necessarily implies that the tax imposed attaches at production rather than at sale or removal. Certain of the regulations which were relied upon by respondent in the court below as establishing his contention that administrative interpretation of the wine taxing statute followed his theory are reprinted in the appendix to this brief. The regulations relied on are of two types. One type provides for an allowance for evaporation or accidental loss of wines on storage or during cellar treatment, but no regulation refers to *unsold* wine on storage or during cellar treatment. These are the regulations promulgated by the Commissioner by virtue of the power granted him by Internal Revenue Code, Section 3039(a), discussed earlier in this brief. This type of regulation is certainly not contrary to petitioner's position. The other type of regulation requires inventories and check-lists and permits the destruction of spoiled wine without payment of tax in the presence of an internal revenue officer. The primary purpose of this type of regulation is to prevent evasion of taxes.

Petitioner does not dispute the validity of such regulations. They are to provide a set of figures that may be checked against the return made by the taxpayer. These are reasonable regulations seeking to protect the Government's taxing interests. They do not attempt to clarify the taxing statute. They do not attempt to rule that the wine tax attaches at the time of production, therefore they cannot have the effect claimed by respondent. They cannot serve as an aid to the interpretation of the taxing statute. The court below recognized the force of this contention of petitioner in its opinion. [R. 69.]

Respondent contended in the court below that the regulations above referred to followed by a re-enactment of the statute in the same form constituted an adoption by Congress of the administrative regulation. Petitioner replied that this principle of law was subject to two well-defined limitations. One limitation is expressed in the Supreme Court case of *Biddle v. Commissioner of Internal Revenue,* 302 U. S. 573, at page 582; 82 L. Ed. 431, at page 439, where the court states:

> "Where the law is plain the subsequent reenactment of a statute does not constitute adoption of its administrative construction. Iselin v. United States, 270 U. S. 245, 70 L. ed. 566, 46 S. Ct. 248; Louisville & N. R. Co. v. United States, 282 U. S. 740, 75 L. ed. 672, 51 S. Ct. 297; Helvering v. New York Trust Co., 292 U. S. 455, 78 L. ed. 1361, 54 S. Ct. 806, *supra.*"

The second regulation is well illustrated by the case of *Texas & P. R. Co. v. U. S.,* 289 U. S. 627, at 643; 77 L. Ed. 1410, at 1425, where it is stated:

> "We think that at the date of the passage of the Transportation Act, no such administrative practice had been established as to require the conclusion that in failing to amend Sec. 3 the Congress approved any asserted power to adjust export and import rates in the interests of the ports alone."

The case of *Helvering v. New York Trust Co.,* 292 U. S. 455, 78 L. Ed. 1361, concerned the meaning that should be attached to the Congressional definition of the words "capital assets" for income tax purposes under the Internal Revenue Act of 1921. The regulation approved in 1922 didn't purport to define these words, although it dis-

cussed an analogous situation. Certain other rulings were made. The Revenue Act of 1924 retained the same definition as the prior Act. The Commissioner contended that Congress thereby approved this construction. The court held otherwise, saying (292 U. S. 468, 78 L. ed. 1368):

> "The definition had not been construed in any Treasury decision, by the Board of Tax Appeals or by any court prior to that enactment. The dates of all constructions of the definition to which our attention has been called are shown in the margin. The Regulation above referred to was approved February 15, 1922. *In respect of the question here involved, it puts no construction upon the definition.* The rulings, I. T. 1379, 1660 and 1889, cited by the Commissioner were made before the passage of the 1924 Act but they 'have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law.' See cautionary notice published in the bulletins containing these rulings. *It does not appear that the attention of Congress had been called to any such construction. There is no ground on which to infer that by the 1924 Act Congress intended to approve it.*" (Emphasis added.)

Petitioner has previously pointed out that there has been no administrative regulation which purported to declare that the tax was imposed on production rather than sale. If, as claimed by respondent in the court below, it has been the long continued practice of the Internal Revenue Bureau to consider the tax here under discussion a production tax, it seems at least strange that no appeal was taken by the Government in *Fresno Grape Products Corp. v. U. S., supra,* previously cited to this court as upholding petitioner's contention.

POINT C.

The Case of Liggett & Myers Tobacco Co. v. U. S., 299 U. S. 383; 81 L. Ed. 294, so Strongly Relied Upon by the Circuit Court of Appeals, Has No Application to the Case at Bar.

Respondent has relied strongly upon the opinion of this court rendered in *Liggett & Myers Tobacco Co. v. U. S.*, 299 U. S. 383; 81 L. Ed. 294. That case involved the question of whether or not a tax levied upon tobacco became a burden upon the state to which the tobacco was sold, contrary to constitutional provisions. This court held that the statute involved levied a tax upon the manufacturer of tobacco and therefore was in fact a tax upon the manufacture rather than sale and only indirectly burdened the buyer. The pertinent parts of the statute construed in the *Liggett & Myers* case follow:

> "Upon all tobacco * * * manufactured in * * * the United States, and hereafter sold by the manufacturer * * * there shall be levied, collected, and paid * * * a tax of 18 cents per pound, *to be paid by the manufacturer * * * thereof.*" (Section 401(a) of the Revenue Act of 1926, 44 Stat. 9; emphasis supplied.)

The court below held this statute to be basically similar to the statute involved in the case at bar. [R. 68.] Petitioner contended that the tobacco tax statute was materially different and therefore judicial construction of the statute should not be binding upon the court in the case at bar. It is significant that the tobacco statute declares that the tax is to be paid by the manufacturer as distinguished from the seller. The wine statute does not state that the producer must pay the tax. The tobacco statute

contains no phrase modifying "and shall be levied, collected, and paid." In the wine statute the phrase "levied, collected, and paid" is followed by the phrase, "when sold or removed for consumption or sale." The word "when," denoting time of levy, does not appear in the tobacco statute.

Petitioner contends that the intention of Congress when enacting the wine statute was to impose the tax upon sale. There is a reason for Congress to distinguish between tobacco and wine. It is common knowledge that wine is kept on storage for long periods of time during which it undergoes an aging process. This is not true of tobacco. Tobacco will be immediately sold. There is therefore no reason for Congress to withhold the levy of the tax. In the case of wine making, however, there is an adequate reason to withhold the attaching of the tax. The court below apparently overlooked this distinction, as shown by the following excerpt from the Circuit Court of Appeals opinion:

> "Of course, tobacco is manufactured and wine is produced, for sale, and both the tobacco and the wine will, in due course, be sold and removed from the place of production. Congress, in enacting tax laws, had this in mind and did not provide for the highly unlikely, mere possibility that the manufactured tobacco and the produced wine are to be or will be kept unsold or unmoved from the factory or the winery indefinitely. Knowing that in due course these commodities will be directed into trade channels, there is nothing strange in the fact that Congress withheld the payment of the tax until they had reached that status." [R. 69.]

Before the tax burden is placed upon the producer by a decision of this court, it should be clear that Congress so intended to place the burden. Petitioner submits that the statute involved herein, far from disclosing such an intention, clearly indicates the intention of Congress was to impose the burden of the tax only *after* sale or removal for consumption or sale.

In *Indian Motocycle Co. v. U. S.*, 283 U. S. 570; 75 L. Ed. 1277, this court was asked to construe a statute that laid an excise tax upon motorcycles. Again, the issue was not whether the article taxed ever became subject to the tax, but rather whether or not the tax constituted a burden upon the buyer. This court held that the tax was imposed upon the sale of the article and therefore constituted a burden upon the buyer. The statute involved was Section 600 of the Revenue Act of 1924, 43 Stat. 253, 322, U. S. C., Title 26, Section 882, which provided that there "shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased." In the course of this court's decision, it is stated, at 283 U. S. 574; 75 L. Ed. 1280:

> "We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale."

This court distinguished the *Indian Motocycle* case in the *Liggett & Myers* case as follows:

> "Indian Motocycle Co. v. U. S., 283 U. S. 570, 75 L. Ed. 1277, 51 S. Ct. 601, *supra,* much relied upon by petitioner, considered a tax of five per

centum of the price obtained upon sale of the article; it rose or fell according to the amount received by the seller." (299 U. S. 387; 81 L. Ed. 297.)

It would seem, therefore, that this court has been heretofore guided to a great extent by the nature of the tax imposed. If the tax does not vary according to the resale value of the commodity, a tax on manufacture is indicated. If the tax does vary according to resale value, a tax on sale is indicated. Petitioner respectfully calls this court's attention to the fact that the wine tax has always been a graduated tax which increases as the alcoholic content increases and hence the resale value of the wine becomes greater. The following portion of Section 3030(a) (1) (A), Internal Revenue Code, as it now appears, is reprinted for the purpose of showing the increase of rates as aforesaid:

"On wines containing not more than 14 per centum of absolute alcohol, 10 cents per wine-gallon, the per centum of alcohol under this section to be reckoned by volume and not by weight;

"On wines containing more than 14 per centum and not exceeding 21 per centum of absolute alcohol, 40 cents per wine-gallon;

"On wines containing more than 21 per centum and not exceeding 24 per centum of absolute alcohol, $1.00 per wine-gallon;

"All such wines containing more than 24 per centum of absolute alcohol by volume shall be classed as distilled spirits and shall pay tax accordingly."

It is fundamental that revenue statutes must be construed most strongly against the taxing authority. A few

of this court's decisions with respect to such principle of construction are cited in the foot-note.[1]

Neither the *Liggett & Myers* case nor the *Indian Motocycle* case involved the issue of whether or not the taxpayer became liable for the tax. In the case at bar, however, wherein the question of whether or not the tax attached at all is involved, this court should resolve all doubts in favor of your petitioner, the taxpayer.

Conclusion.

Petitioner submits that the foregoing petition and this brief support the following propositions:

1. The language of Section 611 of the Act of February 24, 1919 (Revenue Act of 1918, as amended, Section 3030(a)(1)(A), Internal Revenue Code), is clear and unambiguous. In said statute Congress imposed a tax upon wine to attach when said wine is sold or removed for consumption or sale. The Circuit Court of Appeals erred in holding that said statute imposed a tax upon the production of wine.

2. The administrative provisions of the Bureau of Internal Revenue may not be resorted to as an aid to interpretation, inasmuch as the statute involved is clear and unambiguous. Assuming, however, that the statute is ambiguous, no administrative regulation exists that is inconsistent with petitioner's theory.

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[1]*U. S. v. Isham*, 84 U. S. 496; 21 L. Ed. 728; *American Net & Twine Co. v. Worthington*, 141 U. S. 468; 35 L. Ed. 821; *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204; 74 L. Ed. 371; *Reinecke v. Gardner*, 277 U. S. 239; 72 L. Ed. 277.

3. *Liggett & Myers Co. v. U. S., supra,* is not applicable to the case at bar, since the statute construed therein is dissimilar. Moreover, the factual situation involved in the *Liggett & Myers* case is entirely at variance with the statute involved in the case at bar. The Circuit Court of Appeals erred in adopting the decision of the *Liggett & Myers* case as binding its decision in the case at bar.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory power, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals.

HAROLD C. MORTON,
Counsel for Petitioner.

JOHN H. BLAKE,
Of Counsel.

APPENDIX.

Extracts From Regulations No. 7 (1937) Relative to the Production, Fortification Tax Payment, Etc. of Wine, Promulgated by the United States Treasury Department, Bureau of Internal Revenue.

"Article XXXIV.—Losses.

"PAR. 172. Claims for losses.—Proprietors of bonded wineries and bonded storerooms will claim credit in their winery or storeroom accounts, Forms 702, 702-A, and 702-B, for losses of wines in bond only when it is ascertained that losses have been sustained and only for such quantities as are known to have been lost.

"PAR. 173. Inventories.—Each proprietor of a bonded winery or bonded storeroom will take an inventory of all wines on storage on June 30 and December 31 of each year, and will enter on his winery or storeroom accounts, Forms 702, 702-A, and 702-B, for those months the losses disclosed by such inventories. Additional inventories may be taken at such other times as the proprietor may desire and the losses disclosed thereby entered on the wine or storeroom accounts. Losses by fire or other casualty, or any other extraordinary or unusual losses, will be reported to the district supervisor immediately after they occur. Credit may also be claimed for such other losses as are actually ascertained to have been sustained, but no credit may be claimed for estimated losses. When an inventory is taken, such fact should be noted on Forms 702, 702-A, and 702-B.

"PAR. 174. Losses at wineries and storerooms.—Where the losses at a bonded winery or bonded storeroom during any fiscal year, beginning July 1 and ending June 30,

exceed 3 per cent of the aggregate quantity of wine on hand at the beginning of the fiscal year and received in bond during the fiscal year, and 6 per cent of the wine produced at a bonded winery by fermentation, or vermouth manufactured, during the fiscal year, or when requested by the district supervisor, the winemaker or proprietor of a bonded storeroom must file with the district supervisor for his district, within 30 days after the close of the fiscal year, an application under oath for remission of the tax on the entire loss, and set out therein all the material facts relating to the loss, and particularly the nature, cause, and extent of the loss. The application will also state the quantity of wine destroyed for which special allowance was made. Applications must be prepared by or at the direction of the proprietor or his duly authorized agent.

"PAR. 175. Percentage of loss allowed.—The percentage of wine lost will be calculated by fiscal years, beginning July 1 and ending June 30, and will be based on the quantity of wine on hand at the beginning of the fiscal year plus the quantity received and produced during the fiscal year. The percentage of loss from each taxable class of wine will be calculated separately, unless there has been a mixture of different classes during the fiscal year, in which case the percentage of loss will be calculated on the aggregate quantity. Losses of vermouth will be determined separately. The allowances above provided will apply to the losses of each fiscal year separately and will not be cumulative.

"PAR. 176. Cause of loss.—The nature, cause, and extent of the loss must be stated specifically and in sufficient detail to disclose all the material facts and circumstances surrounding the loss. Where the loss is due to

leakage, the cause of the leakage must be stated; where due to racking, the quantity of wine racked and the time of racking should be given; where due to excessive evaporation, the cause therefor should be set out fully; where due to baking of wine, all of the information required to be entered on the record prescribed by paragraph 85 must be furnished. The particulars of losses from other causes should be given in like manner. Where possible to do so, the loss from each tank or package should be explained separately.

"PAR. 177.—Losses of wine in making vermouth.—Where losses of sweet wine transferred to the vermouth department and the losses of such wine in the process of manufacturing vermouth appear to be excessive, the district supervisors will make such investigation, or require such evidence to be submitted, as may be deemed necessary and will advise the Commissioner of their findings and recommendations relative to allowance or disallowance of the loss.

"PAR. 178. Losses in transit.—Where the loss of wine in transit from any package, case, cask, or tank car shipped in bond exceeds 1 per cent (2 per cent on transcontinental shipments) of the quantity so shipped therein, the proprietor of the winery or storeroom from which the wine is shipped must file with the district supervisor for his district, within 30 days after the shipment is received at destination or is ascertained to have been lost, an application under oath for remission of the tax on the entire loss, setting out therein all the material facts relating to the loss and particularly the nature, cause, and extent of the loss. The application should be supported by statements of proper railroad officials, or affidavits of

the consignee or other parties, having personal knowledge of the loss. If the loss does not exceed 1 per cent (2 per cent on transcontinental shipments) from any package, application for the allowance of such loss will not be required, provided there are no circumstances indicating that the wine lost, or any part thereof, was unlawfully removed.

"PAR. 179. Insurance.—Each application covering losses by casualty or in transit must state whether the proprietor has been or will be indemnified for the tax on the wine lost. Allowance will not be made for losses where the proprietor is so indemnified.

"PAR. 180. District supervisor's examination.—When an application for remission of tax is filed with the district supervisor, he will carefully examine it and cause such investigation to be made, or require such additional evidence to be submitted, as he may deem necessary, and will forward the application to the Commissioner, together with a statement setting out his recommendation and his reasons therefor, as expeditiously as possible. Where large or excessive losses from casualty or other cause are reported, district supervisors will, upon receipt of such report, immediately make such investigation or require such evidence to be submitted as may be deemed necessary and will advise the Commissioner of their findings and recommendations relative to allowance or disallowance of the loss.

"PAR. 181. Action by Commissioner.—The Commissioner will make such allowances for unavoidable loss of wines while in storage or in transit as in his judgment may be just and proper. District supervisors will carry

all items of loss in bonded wineries and bonded storerooms in their bonded accounts, Forms 733, 733-A, and 733 marked 'Vermouth Account,' as not allowed until the tax is paid on the loss or they are advised by the Commissioner that the loss has been allowed. Tax must be paid on all wines removed contrary to law while stored in a bonded winery or bonded storeroom or in transit in bond regardless of the per cent of loss.

"Article XXXV.—Destruction of Spoiled Wines.

"PAR. 182. Destruction witnessed by officer.—Wine which has unavoidably so soured and spoiled as to be unfit for use as wine may be destroyed without payment of tax, but the destruction thereof must be witnessed in each instance by an officer detailed to such duty by the district supervisor.

"PAR. 183. Notice to district supervisor.—When the proprietor of a bonded winery or bonded storeroom desires to destroy spoiled wine in order to be relieved of tax liability thereon, he will advise the district supervisor as to the approximate quantity of wine which he desires to destroy, and will request that an officer be detailed to inspect the wine and witness the destruction thereof. Where the quantity to be destroyed is in excess of 500 gallons, or 100 bottles if champagne, sparkling or artificially carbonated wine, the proprietor should accompany his request to the district supervisor with a sworn statement setting forth fully the condition of the wine and the cause of spoilage. The district supervisor will thereupon detail an officer to inspect the wine and witness the destruction thereof at the earliest practicable date as hereinafter provided.

"PAR. 184. Inspection by officer.—The officer detailed to this duty will carefully inspect the wine; and if he is satisfied from his inspection that the wine has so spoiled from unavoidable cause as to be unfit for use as wine, and if there are no circumstances indicating that the wine has been tampered with through the removal of the original content and the substitution of water or other liquid in lieu thereof, he will permit the destruction of the wine in his presence, provided the quantity to be destroyed is not in excess of 500 gallons, or 100 bottles if champagne, sparkling or artificially carbonated wine.

"PAR. 185. Samples.—If there are circumstances indicating that the wine may have been tampered with through the removal of the original contents and the substitution of water or other liquid in lieu thereof, or if the quantity to be destroyed is in excess of 500 gallons, or 100 bottles if champagne, sparkling or artificially carbonated wine, the officer will take a sample from each package or bulk container of the wine which it is desired to destroy, which he will submit to the nearest Bureau branch laboratory for analysis. After samples are taken therefrom packages and bulk containers will be sealed by the officer. A sufficient number of samples of champagne, sparkling or artificially carbonated wine, to be truly representative of the entire lot to be destroyed should be taken.

"PAR. 186. Test for alcohol and acids.—The chemist will test the wine for both alcohol and acids and examine it for other cause of spoilage, and will state in his report whether the wine is unfit for use as such. Where the analysis indicates that the wine has been tampered with, the chemist will so state in his report. If the chemical analysis of the samples shows the material to be unfit

for use as wine and to contain 6 per cent or more of alcohol and acids combined, by volume, the district supervisor may authorize the wine to be destroyed in the presence of the officer. Wine so destroyed will not be included with other losses in calculating the per cent of loss under paragraphs 174 and 175.

"PAR. 187. Explanation required.—If the analysis shows the wine to contain less than 6 per cent of alcohol and acids combined, by volume, destruction without payment of tax will not be permitted unless the low alcoholic content is satisfactorily explained by affidavit to the district supervisor. Neither will destruction without payment of tax be authorized where it is found that the wine has spoiled through the failure of the proprietor to use reasonable diligence.

"PAR. 188. Officer's report.—Officers supervising the destruction of spoiled wines will measure the wine before authorizing destruction and will state in their reports the quantity destroyed, the condition of the wine, and the apparent cause of spoilage. District supervisors will promptly forward a full report of their findings and action taken in each case, together with a copy of the chemist's report of analysis, to the Commissioner.

* * * * * * * * *

"Article XXXVIII.—District Supervisor's Accounts.

"PAR. 201. Monthly accounts.—District supervisors will render monthly accounts on Forms 733 and 733-A of transactions at bonded wineries and bonded storerooms. Form 733 will be used for still wines, Form 733-A for champagne, sparkling wine, and artificially carbonated

wine, and Form 733 marked 'Vermouth Account' for vermouth. These accounts will be prepared from data obtained from Forms 702, 702-A, and 702-B rendered by the proprietors of bonded wineries and bonded storerooms.

"PAR. 202. Unaccounted for items.—Still wine and vermouth shipped to other bonded premises will be carried as unaccounted for until Form 702, 702-B, or 703 is received showing that the wine has been received at the premises to which shipped. Wine shipped for export will likewise be carried as unaccounted for until Form 711 and bill of lading are received showing exportation of the wine. Losses in transit will be carried as not allowed until the same are allowed by the Commissioner or the tax is paid thereon.

"PAR. 203. Losses reported.—The quantity of spoiled wines destroyed in the presence of Government officers in accordance with Article XXXV, and the quantity of lees destroyed or removed in accordance with Article XXXVI, will be reported as loss. Where there is no evidence or circumstances indicating that the wines were tampered with through removal of the original content and the substitution of water or other liquid in lieu thereof, credit may be taken for such items as loss allowed on storage.

"PAR. 204. Accounts in duplicate.—District supervisors' monthly accounts will be prepared in duplicate and by States within the district. One copy will be retained by the district supervisor and one copy forwarded on or before the last day of the month succeeding that for which rendered, to the Commissioner, together with copies of Forms 701, 702, 702-A, and 702-B."

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 909

CATHERINE NESA CONTERNO, PETITIONER

v.

NAT ROGAN, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The district court rendered no opinion and its findings of fact and conclusions of law (R. 42–48) are unreported. The opinion of the circuit court of appeals (R. 64–71) is reported in 132 F. (2d) 726.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 31, 1942 (R. 72). A petition for rehearing was denied on February 16, 1943 (R. 73). The petition for a writ of certiorari was filed on April 10, 1943. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the tax imposed by Section 3030 (a) (1) (A) of the Internal Revenue Code is a tax upon the production of wine, or a tax upon the sale or removal for sale of the wine?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10–13.

STATEMENT

This is an action brought to recover an alleged overpayment of a wine tax. The case was tried by the district court without a jury (R. 42). The pertinent facts, as found by the district court, may be summarized as follows:

Petitioner was the owner and operator of a bonded winery located at Vista, California, which on December 8, 1939, was destroyed by fire. At that time there was stored in the premises more than 18,153.33 gallons of wine of alcoholic content of 14 to 21 percent by volume, and this wine was irrevocably lost in the fire. (R. 43, 44, 45.) At the time of the fire the wine had not been sold, removed for sale or consumption, hypothecated, or encumbered, nor was there any existing contract to sell it (R. 44). Following the filing by the petitioner on January 15, 1940, of a report

with the Alcohol Tax Unit of the Internal Revenue Service of the Treasury Department showing the loss by fire of the wine, a tax of 10 cents per gallon was assessed in April 1940 on the 18,153.33 gallons. After notification of the assessment and demand for payment, petitioner filed a claim for abatement of the tax, which was rejected. (R. 45–46.) Petitioner thereupon paid the tax, which amounted to $1,815.33 plus a penalty ($90.77) and interest ($31.41). Following rejection of a claim for refund, this suit was started. (R. 46.)

The amended complaint (R. 7–13) contained two causes of action. The first (R. 7–11) was predicated upon the theory that no tax had attached at all. The second (R. 12–13) was predicated upon the theory that if the tax had attached, the Commissioner had arbitrarily refused to make the refund. Although only the first count was tried before the district court (R. 22), the court made some findings, although not complete findings, which were pertinent only to the second cause of action. Before the circuit court of appeals there was some question as to whether the district court had entered judgment upon both the causes of action. However, it was agreed by counsel at the bar of the court that if the judgment of the district court upon the first cause of action should be reversed, the cause should be remanded for trial upon the second. (R. 65.) The circuit court

of appeals reversed the judgment of the district court and remanded the case for trial upon the second cause of action (R. 72). A petition for rehearing was thereafter filed and denied (R. 73).

ARGUMENT

1. Petitioner manufactured wine which was destroyed by fire prior to its sale or removal from the winery for purposes of consumption or sale. The issue turns upon whether the tax imposed by Section 3030 (a) (1) (A) of the Internal Revenue Code[1] (Appendix, *infra*, p. 10) is an excise upon the manufacture of wine, or attaches only at the time of sale. The statute provides in part:

> Upon all still wines, * * * produced in * * * the United States * * * there shall be levied, collected and paid taxes at rates as follows, when sold or removed for consumption or sale:
>
> * * * * *

The circuit court of appeals held that the tax is one upon the manufacture of the wine and that the adverbial clause "when sold or removed for consumption or sale" is a provision designed merely to mitigate the burden of the tax by delay-

[1] This Section was derived from Sections 611 and 613 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, as amended by Section 451 of the Revenue Act of 1928, c. 852, 45 Stat. 791; Section 6 of the Liquor Taxing Act of 1934, c. 1, 48 Stat. 313; Section 319 (c) of the Liquor Tax Administration Act, c. 830, 49 Stat. 1939.

ing the time for payment in the ordinary case until the wine has been sold and the producer put in funds. Since in this case the destruction of the wine by fire made it impossible for it ever to be sold in the future, the tax was due immediately. In this construction of the statute, the court below was squarely supported by *Liggett & Myers Co.* v. *United States,* 299 U. S. 383, in which this Court said of a similar statutory provision which imposed a tax upon tobacco (p. 386):

> The tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale. The goods may be disposed of at any price without affecting the amount of the tax; that does not vary. Always the manufacturer must pay 18 cents upon each pound—no more, no less. True the limit of time for making payment is when the product is sold or removed, but this is a privilege designed to mitigate the burden; it indicates no purpose to impose the tax upon either sale or removal. * * *

See also *R. J. Reynolds Tobacco Co.* v. *Robertson,* 94 F. (2d) 167 (C. C. A. 4), certiorari denied, 304 U. S. 563.

It is to be noted that the *Liggett & Myers* case (299 U. S. at p. 384) was stronger for a construction of the tobacco tax as one upon the sale, for that tax was levied upon "all tobacco and snuff manufactured in * * * the United States, *and*

hereafter sold by the manufacturer * * *," whereas the statute here involved provides: "Upon all still wines, * * * produced in * * * the United States * * *, there shall be levied, collected, and paid taxes at rates as follows, *when* sold * * *." [Italics supplied.] Nor are there any differences between the two taxes which would support a different construction of the wine tax. Petitioner's suggestion (Pet. 22) that such a difference might be found in the fact that the tobacco tax statute declares that the tax is to be paid by the manufacturer is plainly without merit, for even under petitioner's position the wine tax must also be paid, if paid at all, by the producer. And, as in the case of the tobacco tax, the tax here does not vary with the price obtained upon sale.

Moreover, the construction of the statute by the circuit court of appeals is consistent with the provisions allowing the tax-free removal of 200 gallons of wine per year for the family of the producer thereof, and with Section 3039 (a) of the Internal Revenue Code [2] (Appendix, *infra*, p. 11) which grants authority to the Commissioner to make allowances for unavoidable loss of wines while in storage or during cellar treatment.

2. The decision below is in accordance with the long continued administrative construction of this

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[2] This section was derived from Section 622 of the Revenue Act of 1918, c. 18, 40 Stat. 1057.

statute. Following the substitution, by Section 402 (a) of the Revenue Act of 1916, c. 463, 39 Stat. 756, of the type of tax here involved for the earlier tax on sales of wine to consumers (see Section 2 of the Act of Ocober 22, 1914, c. 331, 38 Stat. 745), Treasury Regulations 28, Supplement 2, were adopted in September 1916. Article 16 thereof laid down the conditions under which the Commissioner would make allowances for unavoidable loss of wines, including loss by fire, while in storage or during cellar treatment. The provisions of Paragraphs 173, 174, 176, 179, and 181 of Regulations 7 (1937 ed.) (Appendix, *infra,* pp. 11–13) are similar, though more detailed. Since these provisions speak specifically of losses occurring at the winery, provide for credits or abatement of the tax in appropriate circumstances, and rule that there will be no abatement where there has been indemnification for the tax by insurance, they can only be reconciled with the view that the tax attaches upon the production of the wine. This has been the consistent administrative construction[3] and, although various amendments have been made to the statute[4] from

[3] See T. D. 2545, 19 Treasury Decisions, Internal Revenue 229 (1917); Treasury Regulations 60 (1924 ed.), Sections 570–578; Treasury Regulations 2 (1927 ed.), Sections 712–716; Treasury Regulations 7 (1930 ed.), Paragraphs 131–134, 145–151.

[4] Section 451, Revenue Act of 1928, c. 852, 45 Stat. 791; Section 6, Liquor Taxing Act of 1934, c. 1, 48 Stat. 313; Section 319 (c), Liquor Tax Administration Act, c. 830, 49

time to time, Congress has not seen fit to alter the statute in this regard. Under the familiar rule, the administrative construction must be deemed to have acquired the force and effect of law. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459; *Helvering* v. *Winmill*, 305 U. S. 79, 83.

3. *Fresno Grape Products Corp.* v. *United States*, 11 F. Supp. 55 (Ct. Cls.), is not precisely in point, although there is some language in the opinion to the effect that the tax here involved does not attach until sale. There the taxpayer added acetic acid to wine which it had on storage and sold the resultant product, which was then not wine, but vinegar stock. In holding that no tax had attached, the court relied upon a Section of the Regulations which provided that, if in the course of production the product should through natural processes become vinegar or vinegar stock rather than wine, no tax would attach. This provision is, of course, not inconsistent with the administrative construction of the tax as one upon the production of wine, for in such a situation no wine would be produced. The court thought, however, that there should be no different result where wine had been initially produced and then had later been converted into vinegar stock by the application of chemicals. In any event, as the court below noted, the *Fresno Grape Products* case

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Stat. 1930; Section 214, Revenue Act of 1940, c. 419, 54 Stat. 516; Section 534, Revenue Act of 1941, c. 412, 55 Stat. 687; Section 604, Revenue Act of 1942, Pub. No. 753, 77th Cong., 2d sess.

was decided prior to the decision by this Court in the *Liggett & Myers Co.* v. *United States,* 299 U. S. 383 (see p. 5, *supra*).

CONCLUSION

There is no occasion for further review. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
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SEWALL KEY,
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MAY 1943.

APPENDIX

Internal Revenue Code:

SEC. 3030. TAX.

(a) *Rate.*—

(1) *Still Wines.*—

(A) *Imposition.*—Upon all still wines, including vermouth, and all artificial or imitation wines or compounds sold as still wine, produced in or imported into the United States after February 24, 1919, or which on February 25, 1919, were on any winery premises or other bonded premises or in transit thereto or at any customhouse, there shall be levied, collected, and paid taxes at rates as follows, when sold, or removed for consumption or sale:

On wines containing not more than 14 per centum of absolute alcohol, 5 cents per wine gallon, the per centum of alcohol under this section to be reckoned by volume and not by weight;

On wines containing more than 14 per centum and not exceeding 21 per centum of absolute alcohol, 10 cents per wine-gallon;

On wines containing more than 21 per centum and not exceeding 24 per centum of absolute alcohol, 20 cents per wine-gallon;

All such wines containing more than 24 per centum of absolute alcohol by volume shall be classed as distilled spirits and shall pay tax accordingly.

Any such wines may, under such regulations as the Secretary may prescribe, be sold or removed tax free for the manufacture of vinegar, or for the production of dealcoholized wines containing less than

one-half of 1 per centum of alcohol by volume.

The taxes imposed by this subparagraph (A) of this paragraph shall not apply to dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume; nor, subject to regulations prescribed by the Commissioner, with the approval of the Secretary, to wines produced for the family use of the duly registered producer thereof and not sold or otherwise removed from the place of manufacture and not exceeding in any case two hundred gallons per year.

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(26 U. S. C. sec. 3030.)

SEC. 3039. ALLOWANCE FOR LOSS DURING STORAGE OR CELLAR TREATMENT.

(a) *Power of Commissioner.*—The Commissioner, with the approval of the Secretary, is authorized to make such allowances for unavoidable loss of wines while on storage or during cellar treatment as in his judgment may be just and proper.

(b) *Transfer of Duties.*—

For transfer of powers and duties of Commissioner and his agents, see section 3170.

(26 U. S. C. sec. 3039.)

Treasury Regulations 7 (1937 ed.):

PAR. 173. *Inventories.*—Each proprietor of a bonded winery or bonded storeroom will take an inventory of all wines on storage on June 30 and December 31 of each year, and will enter on his winery or storeroom accounts, Form 702, 702–A, and 702–B, for those months the losses disclosed by such inventories. Additional inventories

may be taken at such other times as the proprietor may desire and the losses disclosed thereby entered on the wine or storeroom accounts. Losses by fire or other casualty, or any other extraordinary or unusual losses, will be reported to the district supervisor immediately after they occur. Credit may also be claimed for such other losses as are actually ascertained to have been sustained, but no credit may be claimed for estimated losses. When an inventory is taken, such fact should be noted on Forms 702, 702–A, and 702–B.

PAR. 174. *Losses at wineries and storerooms.*—Where the losses at a bonded winery or bonded storeroom during any fiscal year, beginning July 1 and ending June 30, exceed 3 per cent of the aggregate quantity of wine on hand at the beginning of the fiscal year and received in bond during the fiscal year, and 6 per cent of the wine produced at a bonded winery by fermentation, or vermouth manufactured, during the fiscal year, or when requested by the district supervisor, the winemaker or proprietor of a bonded storeroom must file with the district supervisor for his district, within 30 days after the close of the fiscal year, an application under oath for remission of the tax on the entire loss, and set out therein all the material facts relating to the loss, and particularly the nature, cause, and extent of the loss. The application will also state the quantity of wine destroyed for which special allowance was made. Applications must be prepared by or at the direction of the proprietor or his duly authorized agent.

PAR. 176. *Cause of loss.*—The nature, cause, and extent of the loss must be stated

specifically and in sufficient detail to disclose all the material facts and circumstances surrounding the loss. Where the loss is due to leakage, the cause of the leakage must be stated; where due to racking, the quantity of wine racked and the time of racking should be given; where due to excessive evaporation, the cause therefor should be set out fully; where due to the baking of wine, all of the information required to be entered on the record prescribed by paragraph 85 must be furnished. The particulars of losses from other causes should be given in like manner. Where possible to do so, the loss from each tank or package should be explained separately.

PAR. 179. *Insurance.*—Each application covering losses by casualty or in transit must state whether the proprietor has been or will be indemnified for the tax on the wine lost. Allowance will not be made for losses where the proprietor is so indemnified.

PAR. 181. *Action by Commissioner.*—The Commissioner will make such allowances for unavoidable loss of wines while in storage or in transit as in his judgment may be just and proper. District supervisors will carry all items of loss in bonded wineries and bonded storerooms in their bonded accounts, Forms 733, 733–A, and 733 marked "Vermouth Account," as not allowed until the tax is paid on the loss or they are advised by the Commissioner that the loss has been allowed. Tax must be paid on all wines removed contrary to law while stored in a bonded winery or bonded storeroom or in transit in bond regardless of the per cent of loss.

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